

GAHC010120812015



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./228/2015

1. SRI KHIROD SAIKIA and ANR
S/O BINOD SAIKIA VILL- MAHADEVEPUR
P.O. and P.S. MAHADEVPUR
DIST. LOHIT ARUNACHAL PRADESH.

2: SRI MANDEEP DEORI
S/O GUNESWAR DEORI VILL- MAHADEVEPUR P.O. and P.S.
MAHADEVEPUR DIST. LOHIT ARUNACHAL PRADESH

VERSUS

THE STATE OF ARUNACHAL PRADESH AND ORS
TO BE REP. BY THE PUBLIC PROSECUTOR

Advocate for the Petitioner : MS.S GOHAIN

Advocate for the Respondent : PP, A P, MR. N.N. B. CHOUDHURY

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT (CAV)

Date : 09-01-2023

Heard Mr. Y.S. Mannan, learned counsel for the appellants and also heard
Mr. N.N.B. Choudhury, learned P.P. for the State of Arunachal Pradesh.

2. This appeal, under section 374[2] of the Code of Criminal Procedure is directed against the judgment and order dated 10.08.2015, passed by the learned Sessions Judge, Tezu in Sessions Case No. 07[L]/2013, under section 376[2][g] IPC. It is to be noted here that vide impugned judgment and order the learned court below has convicted the appellants, namely Khirod Saikia and Sri Mandeep Deuri, under section 376[2][g] IPC and sentenced them to suffer rigorous imprisonment for 10 years and also to pay a fine of Rs. 25,000/- with default stipulation.

3. The factual background leading to filing of the present appeal is briefly stated as under:-

“On 23.08.2019, at about 15:00 hours, the informant Smti X, ‘name withheld’, hereinafter prosecutrix, lodged an FIR with the Officer In-Charge Mahadevpur P.S. alleging *inter alia* amongst other that on 31.07.2009, she and her friends were invited for a birthday party by Shri Ramakanta Deori and Mandeep Deori, to be held on 02.08.2009, on the river bank of Noadihing river, of Mahadevpur. Accordingly, the prosecutrix, along with two other girls, namely Smti. ‘Y’ (name withheld) and Smti. ‘Z’ (name withheld) went to attend a party. While they reach the spot, they were informed that it was a celebration of friendship day, not of the birthday party and there they have found altogether seven boys, namely **Shri Jitu B.K. Deori, Thumpteen Bapu, David B.K. Deori,, Dhan Bahadur Chetry, Khirod Saikia, Ramakanta Deori and Mandeep Deori.** During the party, the boys made them to take beer and wine and made them drunk. After sometime, Thumting Bapu, Sri Dhanbahadur Chetri took away Smti. ‘Z’ to the other side of the river. Thereafter, Smti. ‘Y’ was taken away by other boys. And thereafter, Khirod Saikia, Mandeep Deori, Ramakanta Saikia and another boy undressed the prosecutrix. She then cried and shouted

for help. But, the boys covered her mouth with hand and committed gang rape upon her one by one, and also recorded the video of the same in their mobiles. She was about to report the matter to her elders and to the administration, but, the guardians of her two friends requested her not to disclose the matter. But, when the video was made viral she had lodged the FIR.

Upon the said FIR the O/C of Mahadevpur P.S. registered Mahadevpur P.S. Case No. 11/2009, under section 376[2][g] IPC read with section 67[A] of IT Act 2000, and himself investigated the same. During the investigation he has visited the place of occurrence and examined the witnesses, got the victim examined by Doctor and collected the report and also arrested the accused and forwarded them to the court and also got their confessional statement recorded in the court. The I.O. also got the statement of the victim girl recorded in the court under section 164 Cr.P.C. Then on completion of investigation, the IO laid charge sheet against the present appellants, along with 2 juveniles, namely, David Bikomia Deuri and Ramakanta Deuri, to stand trial in the court under the aforesaid sections of law.

On commitment of the case, the learned Sessions Judge, Tezu after hearing learned Advocates of both the parties, framed charge against both the appellants under section 376[2][g] of the IPC read with section 67[A] of the IT Act and on being read and explained over the appellants pleaded not guilty to the same. Thereafter, the learned court below has examined as many as 7 witnesses, including M.O. and I.O. and thereafter, examined the appellants under section 313 Cr.P.C. Thereafter, hearing arguments of learned Advocates of both the parties, convicted both the appellants under section 376[2][g] of the IPC and sentenced them that as aforesaid. However, the learned court below has acquitted the appellants of the offence under section 67[A] of the IT Act."

4. Being highly aggrieved the appellants preferred this appeal on the ground that :-

[a] the learned court below erred in law as well as in fact in convicting the appellants and as such the impugned judgment and order is liable to be set aside;

[b] the evidence recorded by the learned court below does not warrants any conviction of the appellants under section 376[2][g] of the IPC;

[c] the learned court has failed to consider the fact that the prosecution witnesses are not trustworthy and another victim- Smti. 'Y' has not lodged any FIR and that Smti. 'Y', who was all along with the prosecutrix, has not seen the appellants committing rape upon the prosecutrix, and there is no eye witness to the occurrence and the learned court below has convicted the appellants on the basis of video and photograph of the prosecutrix;

[d] the learned court below has solely relied upon the evidence of the prosecutrix, whose evidence is not at all reliable and insufficient to establish the offence and there is no corroborative piece of evidence and also there is contradiction in her version;

[e] there is inordinate delay in lodging the FIR. While the occurrence took place on 02.08.2009, the FIR was lodged on 23.08.2009, after 21 days and the same has not been explained properly and the video clipping and the credibility of the same not been established by the prosecution side by obtaining opinion of Forensic Experts and that the prosecution side has failed to produce the original video clipping;

[f] the medical evidence also is not consistent with the prosecution

version and there is material discrepancy in the version of P.W. 1, 2 and 3 with that of the MO and the learned court below has failed to consider the same, and therefore, it is contended to allow this petition.

5. Mr. Y.S. Mannan, the learned counsel for the appellants, during hearing, canvassed following points :-

[a] that, there is inordinate delay in filing the FIR and the same has not been explained properly and this unexplained delay raised doubt about the veracity of the prosecution version;

[b] that, except the prosecutrix, none of the witness so examined by the prosecution side, have implicated the appellants;

[c] that, at the time of occurrence both the victims were highly drunk and intoxicated and they were not in a position to identify the appellants;

[d] that, if anything has happened during party, it was consensual, and that the FIR was lodged only when the video, recorded in the mobile of the appellants came to the market and that the authenticity of the said video has not been determined by the prosecution side by sending it to the FSL and the victims were habituated to such parties and the appellant Khirod Saikia was not seen in the video and he is the relative of the prosecutrix, and as the victims were totally drunk, so they could not know what had happened with them and there is distortion of fact in their versions.

Therefore, Mr. Mannan contended to allow to this appeal by setting aside the impugned judgment and order. Mr. Mannan also referred one case law - **Rai Sandeep @ Dipu vs. State [NCT] of Delhi** reported in **[2012] 8 SCC 21**, in support of his submission.

6. On the other hand, Mr. N.N.B. Choudhury, learned P.P. for the State of Arunachal Pradesh, submits that the delay in filing the FIR has been properly explained and that out of fear and shy the prosecutrix has not approached the police station by filing any FIR and the defence side cannot take any benefit of the said delay. Mr. Choudhury further submits that the appellants were charged under section 376[2][g] of IPC and that the victims have categorically stated that there was no consent to the act, and as such the presumption under section 114[A] of the Evidence Act is available here in this case. Further, Mr. Choudhury submits that the victims were minor at the relevant point of time, and as such, even if there was any consent, the same is not material and that there is no merit in this appeal and therefore, Mr. Chaudhury has contended to dismiss the same. Mr. Choudhury also relied upon three case laws **(i) Bijay @ Chinee vs. State of Madhya Pradesh** reported in **[2010] 8 SCC 191** and **(ii) State of HP vs. Sree Kanta Sekhari** reported in **[2004] 8 SCC 153** and **(iii) Gangabhabani vs. Raitpatty Venkat Reddy and Others** reported in **[2013] 15 SCC 298**, in support of his submission.

7. Having heard the submission of the learned counsel for both the parties and I have carefully gone through the petition and the documents placed on record and also perused the record of the learned court below, and also gone through the case laws referred by the learned counsel for both the parties.

8. It is the dictum of law that in criminal case delay in lodging the FIR has to be explained satisfactorily. Reference in this context can be made to a decision of Hon'ble Supreme Court in the case of **Thulia Kali vs. State of Tamil Nadu** reported in **AIR 1973 SC 701**, where it has been held as under:-

“The first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial The object of insisting upon prompt

lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as, the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a Creature of afterthought. It is therefore essential that the delay in lodging the report should be satisfactorily explained."

9. In the case of **State of Punjab vs. Gurmit Singh** reported in **[1996] 2 SCC 384** Hon'ble Supreme Court has held as under:-

"In sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged."

10. The Court further held in the said case that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof.

11. In the case in hand, it appears from the material available on the record that the occurrence took place on 02.08.2009, under the bridge of Noadihing river of Mahadevpur and the FIR was lodged on 23.08.2009, and as such there was delay of 21 days in filing the FIR. But, the evidence of the prosecutrix, and also the FIR, reveals that the delay has been explained. In her evidence, the prosecutrix has categorically stated that she has not reported the matter to police immediately due to fear and shy in the society as well as in her school. She could not come out of her house, and besides, she was not confirmed whether her picture was there in the video or not, which came in to the market on 15th of August, 2009 and only after confirmation, she has lodged the FIR. In

the FIR also it is stated that the guardians of her two friends requested her not to disclose the matter. The explanations, so forthcoming, are not disputed by the defence side and the same is found to be believable and accordingly I am inclined to accept the same. It is to be mentioned here that as held in the case of **Gurmit Singh** (supra) by the Hon'ble Supreme Court, in case of sexual offences delay of lodging the FIR may not be due to variety of reason and the same is not always fatal, and Mr. N.N.B. Choudhury, the learned P.P., has rightly pointed this out at the time of his argument.

12. It also appears from the evidence on record that there is no eye witness to the occurrence, except the prosecutrix. Though the prosecution side has examined as many as nine witnesses, including the M.O. and I.O., yet except the victims none of them have seen the occurrence. The evidence of the prosecutrix, reveals that on 2nd of August, 2009, on being invited to attend the birthday party of Mandeep Deuri, she along with Smti. 'Y' and Smti. 'Z' went to the Noadihing river bridge of Mahadevpur and having arrived under the bridge they found four accused persons and three others, namely, Thumtin Bapu, Dhan Bahadur Chetry and Jitu BK Deory. And there they came to know that it was not a birthday party, rather, it was a friendship day and they were invited to celebrate it. After wishing each other, they started consuming beer in disposable glasses and thereafter, Smti. 'Z' left with Thumtin Bapu and Dhan Bahadur Chetri to some other places. Then they started drinking along with the boys and the boys might have mixed hard drinks with the beer, so, she and Smti 'Y' got drunk. As her eye lids started closing due to the effect of beer she asked Smti. 'Y' to stay with her and she felt headache and closed her eyes for few minutes asking Smti 'Y' to sit behind her. She then got asleep and thereafter, she felt that she was dragged and after sometime she felt that her jeans long pant and

black T-shirt were being removed and taken out of her body. She then call the accused Khirod Saikia, who happened to be her cousin and then she found that her mouth has been closed by Khirod Saikia by his hand to repress her voice, and at that time she was in sense and then the four accused had sexual intercourse with her by force.

13. Her evidence also reveals that she has seen the video recorded by the accused persons, where Mandeep Deuri was seen doing sex act with her and her mouth was blocked by Khirod Saikia. After the occurrence, Smti. 'Z' along with 2 other boys came there and Smti. 'Y' has already left the place. When she gained her sense, she found black sign all over her mouth, which was due to forceful closing of her mouth, and when Smti 'Z' was asking about the black sign, then the accused person told that she was fallen on the ground by herself due to heavy intoxication. Then at about 5:30 pm they have taken her up to the bridge and brought her in an auto with Smti. 'Z', who had taken her to her house and make her asleep in bedroom. She did not go to the school for three days, as she was injured badly by the accused persons and she was feeling pain in her private parts, which was swelling due to gang rape, and black spot were there in her mouth along with bruises and scratches caused by nail all over her body, including her breast and neck and there was bruises and scratches on both her thighs, near her private parts.

14. Her evidence further reveals that she has reported the matter to police on 23th August, 2009 by filing one FIR and police got her examined by doctor and also got her statement recorded by the Magistrate and also taken her to the place of occurrence, for showing the spot, where the occurrence took place and took photograph of the same. Her evidence further reveals at the relevant time, her age was 17 years and 10 months, and she was studying in Class - XI, and

she confirmed P-Exhibit 1- the FIR, lodged by her and P-Exhibit 2- her School Certificate issued by CBSE and P-Exhibit- 3, Statement given by her before the Magistrate and Material Exhibit 1, 2 and 3 the photographs of the place of occurrence and Material Exhibit 4, 5 and 6 the photograph of sexual act and Material Exhibit 7 the CD copy of the occurrence.

15. The statement of the prosecutrix- P-Exhibit-2, recorded under section 164 Cr.P.C. by P.W. 8- Mr. Hakraso Kri (Executive Magistrate) also lends support her evidence, wherein she has categorically stated that accused Khirod Saikia, Mandeep Deori, David Deori and Ramakanta Deori have committed rape on her, on 02.08.2009, near the basement of Noadehing River and recorded video of the whole scene in their mobiles.

16. The defence side has cross-examined P.W.1 at length. But, nothing tangible could be elicited to discredit her version. She categorically denied having love affairs with the accused and she confirmed that Material Exhibit- 7 shows the face of accused Mandeep Deuri only not the face of Khirod Saikia, and Ramakanta Deuri was also not seen in the picture. She however admitted that she cannot say as to who dragged her to the place of occurrence. She denied the defence suggestion that she has not remembered anything what has happened to her. She denied having lodged a false case out of personal grudge.

17. The medical evidence also lends support to the version of the P.W.1. The learned court below has examined the Doctor, C. Namsum as P.W.-7, who has examined the prosecutrix (P.W.1). His evidence reveals that on examination of P.W.-1, he found her hymen ruptured, but it was healed, which admit two fingers and though he has not stated in his report, yet, there was a sexual intercourse. He also testified that ruptured hymen generally heals after 7/10 days and he submitted P-Exhibit-8 after examination of P.W.1. His evidence also

reveals that during his examination P.W.1 told him that she was virgin before the incident and no surgical operation was done on her private part and on 2nd of August, 2009 at about 12.30 to 1.30 pm she was raped by 3 of her friends. In cross-examination it is elicited that though he had not found any symptom of rape, yet there was sexual intercourse with the victim.

18. P.W.-2- Smti. - 'Y' and P.W. 3 –Smti.- 'Z' also lend support to the evidence of the prosecutrix. The evidence P.W.-2- Smti. - 'Y', reveals that on 2nd of August, 2009, they, along with P.W.1, proceeded to the bridge of Noadihing river and on reaching the spot at about 11 am they found Khirod Saikia, Mandeep Deuri, Ramakanta Deuri, Thumtin Bapu, Binud Chetry and Davidbikromia Deuri there, and all of them consumed beer and after sometime Smt. 'Z' along with Thumtin Bapu and another boy had left that place and she and P.W.1 were drunk and sitting at that place and then she was raped by Ramakanta Deury and after the incident she left the place and on 23rd August, 2009, she accompanied P.W.1 to the Police Station and lodged the complaint and police got her statement P-Exhibit 5, recorded by a Magistrate. It appears that P-Exhibit- 5 is also consistent with her version.

19. The medical evidence also lends support to the version of the P.W.2. The evidence of the Doctor, P.W.-7, reveals that on examination of P.W. 2, he found her hymen round in shape and there was tear in the hymen, which indicates the sexual intercourse and he submitted P-Exhibit- 9. His evidence also reveals that P.W.2 also stated to him that she was sexually assaulted by one person and they consume liquor before the incident. In cross-examination it is elicited that though he had not found any symptom of rape, yet, there was sexual intercourse with the victim.

20. The evidence P.W.-3- Smti. - 'Z' reveals that on 2nd of August, 2009, they,

along with P.W.1 and 2, proceeded to the bridge of Noadihing river and on reaching the spot at about 11 am they found Khirud Saikia, Mandeep Deury, Ramakanta Deury, Thumtin Bapu, Binud Chery and Davidbikromia Deury there and all of them consume beer and after sometime she along with Thumtin Bapu and Binod Chetry, had gone out of that area and P.W.1 and P.W.2 were drunk and sitting at that place. The evidence of P.W.-3 also reveals that later on, she came to know that a video has become viral in the market, where it is seen that sexual intercourse took place on that day and the lady was P.W.1 and the two boys Ramakanta and Mandip Deori being engaged in the sexual intercourse and in the video she has seen P.W.1 was lying on the ground and Mandip was opening her T - shirt from her body. The defence side has cross-examined both P.W. 2 and 3 at length but failed to shake the credibility of their versions.

21. P.W.-4, Binod Chetry also lend support to the version of P.W.1 that on 2nd of August, 2009 at around 9/10 am he went to Noadihing river bridge to celebrate a birthday party along with Ramakanta Deury and near the bridge he has found Khirud Saikia, Mandeep Deuri, Ramakanta Deuri, Davidbikromia Deuri and Thumtin Bapu and after half an hour three girls have joined them and they drunk together. Thereafter, he along with Thumtin Bapu and one girl went to the river bank and return after 45 minutes, and thereafter, he left to have his food at a nearby Dhaba and thereafter, he return back to his house. Later on, police got his statement P-Exhibit- 6, recorded by Magistrate. His evidence remained unshaken in cross-examination.

22. P.W.-5 is Shri Jitu Deuri and he also lends support to the version of the victim to the effect that he dropped Mandeep Deuri near the Nuadihing bridge, in the year 2009, at about 11 am and there he has seen some boys and girls and one Binod Chetry was also there and later on, he heard that a rape incident

took place on that day. P.W.6 is Thumtin Bapu and he also supported the version of the pw1 that he along with Davidbikromia Deury went to the picnic spot on separate bicycle and later on Khirod Saikia; Mandeep Deuri; Ramakanta Deuri; Smti. 'X'; Binod Chetry; Smti.-'Z'; Jitu Deori and one more girl joined them and all of them drank together. Thereafter, he went to take bath in the river and thereafter, he left for home. Later on, he came to know that a video came into the market and he has seen the video wherein Mandeep Deori was doing sexual act with P.W.-1 and P.W.1 also reported the matter to him and police got his statement P-Exhibit- 7 recorded in the court. Nothing tangible could be elicited in their cross-examination of P.W. 5 and 6.

23. P.W.-8, Mr. Hakrasu Kree is the Executive Magistrate, who has recorded the confessional statement of the accused Khirod Saikia; and Mandip Deuri on 31.08.2009. He confirmed confessional statement of accused Khirod Saikia- P-Exhibit-12, and of accused Mandeep Deori- P-Exhibit 13. A perusal of the same reveals that both the accused confessed having sex with the P.W.1.

24. P.W. 9 is the IO, who has investigated the case and submitted charge sheet P-Exhibit-19, and he also drawn up sketch map, P-Exhibit-18 of the place of occurrence and he seized the video CD, Material Exhibit 7, containing the clip of rape scene which he had downloaded from a mobile phone and he seized the Birth Certificate, P-Exhibit-2 of the P.W.1, and P-Exhibit-4 of P.W 2, and Material Exhibit 4, 5 and 6 the photograph of the scene of crime and downloaded and printed through a professional by him Material Exhibit 1, 2 and 3 are the said photographs. It is elicited in his cross-examination that he could not find out from whose mobile phone the video was made viral.

25. Thus, the evidence of the victims, especially P.W.-1 and also the evidence adduced by other prosecution witnesses goes a long way to establish beyond all

reasonable doubt that the appellants, Khirod Saikia and Mandeep Deuri were the author of the crime. They have committed sexual intercourse with the P.W.1-Smti. 'X', without her consent, along with David Deuri and Ramakanta Deuri, who were the juvenile at the relevant point of time. It is to be noted here that in the case of **Gurmit Singh** (supra) Hon'ble Supreme Court has held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice.

26. Though Mr. Mannan, learned counsel for the appellants submits that the prosecution witnesses are not trustworthy and that the victim No. 2 has not lodged any FIR and that victim No. 2 has not seen the appellants committing rape upon the prosecutrix, yet, I find no ground to disbelieve the version of the P.W.-1. The medical evidence also lends corroboration to her version. Mr. Mannan further tried to persuade this court that the evidence of the prosecutrix is not at all reliable as at the relevant point of time she was drunk. But, I find no substances in the same. The evidence of the victims is consistent with her statement recorded u/s 164 Cr.P.C. and fully corroborated by medical evidence and also by the evidence of the other prosecution witnesses. Her evidence goes a long way to show the involvement of the appellants with the offence charged. I have carefully gone through the case law relied upon by Mr. Mannan

and I find that the same has to be restricted to its own facts. On the other hand, I find sufficient force in the submission of Mr. N.N.B. Chaudhury, learned P.P. and the principle of law laid down in the cases relied upon by him, have strengthened his submission. However, for the sake of brevity detailed discussion of the same are skipped.

27. The learned court below has convicted the appellants under section 376[2][g] of the IPC and in view of the evidence on record, I find no such ground to take a different view from that of the learned court below and accordingly, the conviction of the appellants under section 376[2][g] of the IPC stands affirmed.

28. The learned court below has sentenced both the appellants to suffer rigorous imprisonment for 10 years and also to pay fine of Rs. 25,000/- each, with default stipulation. The same appears to be justified in the view of the nature and gravity of the offence and no interference of this court is called for. And accordingly, this Criminal Appeal stands dismissed. Send down the record of the learned court below with a copy of this judgment and order. The parties have to bear their own cost.

29. Before parting with the record, I deemed it proper to consider another aspect of the matter, i.e. the requirement of awarding of compensation to the two victims of rape i.e. Smti. 'X' -P.W.1 and Smti.-'Y'- P.W.2. It appears that the learned court below, while imposing fine of Rs. 25,000/ (Rupees twenty five thousand) upon each of the appellants, directed to pay the same to only one of the victim. The amount, so directed to be paid to the victim, appears to be quite inadequate, given the nature of injury and trauma they were subjected to. Notably, the learned court below has delivered the impugned judgment and order on 10.08.2015, and on that day Arunachal Pradesh Victim Compensation Scheme-2011, was already in force. The said Scheme has provided for payment

of a sum of Rs.50,000/ (Rupees fifty thousand) to the victim of rape. But, unfortunately, the same eschewed consideration of the learned court below. Therefore, it is provided that the Legal Service Authority, Arunachal Pradesh, shall pay a sum of Rs. 50,000/ (Rupees- fifty thousand) each, to both the victims within a period of three months from today.

JUDGE

Comparing Assistant